NO. 21026

IN THE UNITED STATES COURT OF APPEALS

FOR THE NITH CIRCUIT

MAURICE RAYMOND SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.
United States Attorney,
SHELBY R. GOTT,
Assistant U.S.Attorney,

325 West "F" Street,
San Diego, California 92101

Attorneys for Appellee,
United States of America.

NO. 21026

IN THE UNITED STATES COURT OF APPEALS

FOR THE NITH CIRCUIT

MAURICE RAYMOND SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.
United States Attorney,
SHELBY R. GOTT,
Assistant U.S.Attorney,

325 West "F" Street,
San Diego, California 92101

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (cont'd)

NO. 21026

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAURICE RAYMOND SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in counts one and three of a four-count indictment, following trial by jury (C.T.1-4).[1/] The trial judge dismissed counts two and four at the close of the government's case (C.T.7).

1/ "C.T." refers to the Clerk's Transcript.

The offenses occurred in the Southern Division of the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 3231 and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in each count of a four-count indictment returned on May 26, 1965, by the Federal Grand Jury for the Southern District of California, Southern Division. The first count alleged that on March 26, 1965, appellant knowingly concealed, and facilitated the transportation and concealment of approximately 6.9 grams of heroin, a narcotic drug, which as he then and there well knew, had been imported and brought into the United States contrary to law (C.T.2).

The third count alleges that on March 28, 1965, appellant knowingly concealed, and facilitated the transportation and concealment of approximately 14.4 grams of heroin, a narcotic drug, which as he then and there well knew, had been imported and brought into the United States contrary to law (C.T.4).

Count two alleged the sale of the same quantity of heroin as charged in count one to Harry Watson on March 26, 1965 (C.T.3). Count four charged the sale of the same quantity of heroin as charged in count three to Antonio Celaya (C.T.5).

Jury trial of appellant commenced on August 4, 1965, as to all four counts before United States District Judge Fred Kunzel. Appellant was found guilty as charged on counts one and three on August 6, 1965 (C.T.9, 10), after judgment of acquittal had been granted as to counts two and four on August 4, 1965 (C.T.7).

Thereafter, on August 27, 1965, appellant was committed to the custody of the Attorney General for a period of 10 years on each of counts one and three to run concurrently (C.T.20).

Appellant filed timely notice of appeal on September 2, 1965 (C.T.21).

On October 4, 1965, the sentence was reduced to seven years on each of counts one and three to run concurrently.

III

ERROR SPECIFIED

Errors as alleged by appellant are para phrased as follows:

(1) That appellant was wrongfully entrapped into

committing the offenses charged.

(2) The prosecutor wrongfully showed the Federal Bureau of Investigation record sheet ("rap sheet") to the jury.

IV

STATEMENT OF THE FACTS

Appellant was first contacted by Clifford J. Brooks, a special employee of the Federal Bureau of Narcotics, on March 24, 1965, at the Zebra Club in San Diego. After a few drinks and a short conversation, Brooks asked in an offhand way, "How do you get rich?" And Mr. Shaw said "Smack, man, smack" (R.T.16).[2/] According to Brooks, "Smack," is the slang term for heroin (R.T.17).

Brooks asked appellant if he could purchase some "Smack," to which appellant replied that he had a connection in Tijuana named "Manuel," who is an upholsterer. Brooks ordered an ounce of heroin from appellant at a price of $300.00 for delivery later. Brooks located appellant at the Zebra Club between 11:00 P.M. and midnight the following day (March 25) after he was searched by narcotics agents and they had provided him the sum

2/"R.T." Refers to the Reporter's Transcript.

of $300.00 (R.T.17-19).

Shaw said , "It would take a little while for him to get the heroin," (R.T.18). They proceeded to the Cross Roads bar at Fourth and Market (R.T.20).

Appellant asked Brooks if he was ready to deal. They went to the men's restroom upon Shaw's instructions where Brooks paid $290.00 to Shaw for the heroin, Agent Watson was watching the proceedings from 7 to 8 feet away and on the way to the restroom, appellant and Brooks passed close enough that Brooks pulled the sleeve of Watson's coat. Brooks turned the heroin and the remaining $10.00 of the money over to the agents and was searched again (R.T. 21,22,71).

The second sale took place on March 28, 1965. Brooks was again searched and provided with $600.00 government funds (R. T. 27, 56) and he then proceeded to the Zebra Lounge and met appellant again. Appellant asked if Brooks was ready to go again (R.T.28). Appellant was seated between Brooks and Agent Celaya, Brooks told appellant a joke and appellant slapped Agent Celaya on the back and said "Now that"s a pretty good joke, wasn't it". (R.T.28,81).

Appellant borrowed 10¢ from Brooks' change on the bar to

phone his "connection" (R.T.28-29). Agent Celaya overheard a part of the conversation (R.T.81). Appellant returned after phoning his connection and asked Brooks if he was ready to go. They left the Zebra Club and went to Archie's. After about five minutes at Archie's, appellant invited Brooks outside and they proceeded together to an alcove, where appellant produced Exhibit 2 consisting of two containers of heroin. Brooks then paid appellant $570.00. Brooks turned Exhibit 2 and $30.00 over to the agents and was again searched with negative results (R.T. 30-31).

Both sales were under surveillance by officers (R.T. 54-66, 70-71, 75-79, 81-83, 90-06, 81, 82, 97, 100).

On the second sale, Agent Heisig saw a meeting of hands of appellant and Brooks and saw something white transferred from the hand of appellant to Brooks (R.T. 63).

As to the same transaction, Agent Celaya saw Shaw place his right hand into his right coat pocket. Mr. Brooks extended his right hand. There appeared to be a meeting of the hands (R.T.83).

Brooks worked for the U. S. Post Office and has been a

special employee of the Federal Bureau of Narcotics for 12 years (R.T. 14,36,53).

V

ARGUMENT

A. APPELLANT WAS NOT WRONGFULLY ENTRAPPED INTO COMMITTING THE OFFENSES CHARGED IN COUNTS ONE AND THREE OF THE INDICTMENT.

In the case of Sorrells v. United States, 287 U.S. 435, the Court said at page 451 that predisposition and criminal design are relevant.

In United States v. Becker, 62 F.2d 1007,1008,(2nd Cir. 1933) it was said there are three excuses for inducement,

(1) An existing course of similar conduct

(2) The accused's already formed design to commit the crime or similar crime

(3) His willingness to do so, as evinced by ready complaisance.

There is certainly sufficient evidence in this case for the jury to find that the last two existed as to appellant.

In a short period of time after meeting Brooks and in answer

to Brooks question, "How do you get rich?", appellant answered, "Smack, man, smack." (R.T. 16).

He had delivered heroin in exchange for money about a day later on March 26, 1965 with no further contacts by Brooks (R.T. 21).

Then a second sale was made only two days later on March 28, 1965 (R.T.25,31).

There need not be evidence submitted to the jury that agents had knowledge of illegal selling before they approached one whom they suspected of it.

Sherman v. United States, 200 F.2d 880 (2nd Cir. 1954)

Hadley v. United States, 18 F.2d 507 (8th Cir. 1927)

This would amount to giving the narcotic peddler "one free shot," before he could be convicted. See Young v. United States, 286 F.2d 13 at 15 (2nd Cir. 1960). Assuming entrapment on the first transaction on March 26, 1965, it would appear there could be no entrapment on the second one on March 28, 1965.

The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the government.

Glasser v. United States, 315 U. S. 60, 80 (1942)

Sherman v. United States, 241 F.2d 329 (9th Cir. 1957)

Appellant was impeached

(1) By his prior felony convictions (R.T. 119).

(2) By his denial of knowing, or having met Brooks; his being clearly impeached by all the officers' testimony (R.T. 116) and Robert Pleasant, the bartender, at the Zebra Club (R.T.121-126).

(3) By his claim of having no money (R.T.106) but later admitting having $177.00 on his person on December 12, 1965 (R.T.119).

The defense of entrapment may not be raised for the first time on appeal.

Ramirez v. United States, 294 F.2d 277 (9th Cir. 1960)

Grant v. United States, 291 F.2d 746 (9th Cir. 1961), cert. denied, 368 U.S. 999 (1962).

In Cellino v. United States, 276 F.2d 941 (9th Cir. 1960), the appellant and his attorney were told that the judge knew they did not want an instruction on entrapment and no exception was taken, the issue could not be raised on appeal.

In the instant case, the judge made a similar remark with no objection or comments (R.T. 171).

In the case of Bloch v. United States (9th Cir. 1955), 226 F.2d 189, it was said "the defense of entrapment is not available to one standing ready to commit the offense given an opportunity," and that "an instruction on entrapment was perhaps unnecessary."

The appellant's defense is apparently "mistaken identity" since he wasn't arrested at the scene. He denies any knowledge of the transactions involved (R.T. 104).

The defense of entrapment is unavailable to one who denies committing the acts necessary to constitute the offense charged,

Ortiz v. United States 358 F.2d 107 (9th Cir. 1966)

Ortega v. United States 348 F.2d 874 (9th Cir. 1965)

Ramirez v. United States 294 F.2d 277 (9th Cir. 1961)

B. THERE WAS NO MISCONDUCT BY COUNSEL FOR THE GOVERNMENT.

Appellant contends that counsel for the government showed the Federal Bureau of Investigation record sheet to the jury.

Judge Kunzel presiding over the trial by jury stated, "I didn't observe it and I doubt whether any of the jurors know what a rap sheet is or have ever seen one. I doubt it, and I

don't think that the jurors could see what Mr. Gott (Asst.U.S. Attorney) was looking at." (R.T.172)

Assuming some member of the jury saw the "rap sheet," and recognized it, it would be difficult to imagine any harmful prejudice to appellant who admits serving five penitentiary sentences (R.T.119).

If substantial prejudice does not appear, the error must be regarded as harmless. Berger v. United States, 298 U.S.78 (1935).

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment in the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.
United States Attorney,

SHELBY R. GOTT,
Assistant U. S. Attorney.

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Shelby R. Gott

SHELBY R. GOTT,
Assistant United States Attorney